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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 933

IN THE MATTER OF PETITION OF ETHYL M. SHIBE FOR WRIT OF PROHIBITION TO THE ORPHANS' COURT OF PHILADELPHIA COUNTY AND TO LEWIS H. VAN DUSEN, PRESIDENT JUDGE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

ETHYL M. SHIBE,
Pro Se.

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CONSTITUTION CITED.

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Federal Constitution, Fourteenth Amendment 6, 8, 11

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IN THE MATTER OF PETITION OF ETHYL M. SHIBE IN THE SUPREME COURT OF PENNSYLVANIA FOR WRIT OF PROHIBITION DIRECTED TO THE ORPHANS' COURT OF PHILADELPHIA COUNTY AND TO LEWIS H. VAN DUSEN, PRESIDENT JUDGE, TO PROHIBIT FURTHER PROCEEDINGS, ACTION AND DECREE PURSUANT TO ORDER OF MARCH 18, 1941, IN THE ESTATE OF JOHN D. SHIBE, DEC'D.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Ethyl M. Shibe, respectfully prays for a writ of certiorari to the Supreme Court of the State of Pennsylvania to review the final judgment and decree of said court (R. 5), being the highest court of said state, the decree (rendered without opinion) having been filed and entered of record on December 2, 1941 (R. 5).

Jurisdiction.

The jurisdiction of this Court to review such proceedings on a writ of certiorari is provided by Sec. 237(b) of the

Judicial Code of the United States, as amended (28 U. S. C. A., Sec. 344(b), as interpreted in the following decisions:

Michigan Central Co. v. *Mix,* 278 U. S. 492 (1929);

Bandini Petroleum Co. v. *Superior Ct.,* 284 U. S. 8 (1931).

The Supreme Court of Pennsylvania has decided an important question of Constitutional Law in conflict with decisions of Your Honorable Court and with decisions of State Courts throughout the country, which decisions are hereinafter specifically set forth under "Reasons for Granting Petition."

Statement.

John D. Shibe, your petitioner's husband, died July 11, 1937, leaving a Will in which he named your petitioner sole legatee and devisee of his real and personal property and nominated one Stoughton Sterling his executor. The Will gives no power over real estate to the executor. Of the real estate which descended directly to your petitioner are two properties, the rentals to which are involved in the question at issue, i.e.: a gasoline filling station at 1378-80 E. Rittenhouse Street, Philadelphia, Pa. and a gasoline filling station at 3429 N. 6th Street, Philadelphia.

At decedent's death both properties were under written lease. The former was leased by the Sinclair Refining Co. for a term of ten years, expiring June 10, 1941, and by the terms of said lease, at Shibe's death, his devisee and heir became lessor. The latter property was leased through Albert Quell, agent, by the decedent, and subsequent to his death, by his devisee and heir, to successive tenants for successive terms.

Shortly after the death of her husband, your petitioner became seriously ill, was confined in said illness and unable

to attend to her business and affairs until late in the fall of 1940.

From August 2, 1937, to the termination of the lease on June 10, 1941, the lessee, Sinclair Refining Co., failed to pay your petitioner the rental due her under the terms of the lease, whereupon, on February 6, 1941, she filed suit to collect said rentals (R. 3). Albert Quell, her agent, collected rentals from the lessees of the premises rented through him from August 1, 1937, to November 14, 1940, but failed to pay over said rentals to your petitioner, whereupon, on March 17, 1941, she filed suit against Albert Quell to collect said rentals (R. 3).

The Estate of John D. Shibe was docketed in the Orphans' Court of Philadelphia County, Pennsylvania, in 1940, bearing caption "Estate of John D. Shibe, No. 1275, 1940" (R. 1). The first proceeding taken in said estate in said court was on April 29, 1940, when the first and partial account of the executor was filed. Said account has never been audited, the court having postponed audit until after final disposition of executor's petition for a decree *nunc pro tunc* hereinafter referred to.

On March 18, 1941, after your petitioner had laid claim by filing the aforementioned suits, to the rental derived from her properties from 1937 through 1940, the executor filed in the Orphans' Court of Philadelphia County a petition praying for a decree *nunc pro tunc* authorizing him to collect the rentals from said properties respectively from August 6, 1937 to March 31, 1939, being a portion of the same rentals for which your petitioner had already filed suit (R. 3).

Shortly after the executor's petition for *nunc pro tunc* decree was filed, and upon application of the defendant in reliance upon it, the Court of Common Pleas No. 5 of Philadelphia County, in which your petitioner's suit against the Sinclair Refining Co. was filed, stayed the filing of an

affidavit of defense in said suit until the propriety of the executor's petition for decree *nunc pro tunc* is finally decided. The Municipal Court of Philadelphia County in which your petitioner's suit against Albert Quell was filed similarly stayed the filing of an affidavit of defense in that suit until the propriety of the executor's petition for decree *nunc pro tunc* is finally decided. Thus the rental long due your petitioner and on which she is dependent for the payment of taxes accrued on said properties since 1938, and on which interest and penalties are daily mounting, is being withheld from her, jeopardizing title to her properties, which may any day be liened and sold for nonpayment of taxes.

Prior to March 18, 1941, as the record on its face shows, no application for authority to collect rent from said real estate was made by the executor, nor was any decree so to do ever authorized or rendered by the Orphans' Court of Philadelphia County, or by any judge thereof, in the Estate of John D. Shibe, deceased. There is no claim that a prior decree had ever been directed or authorized by the court and through inadvertence of either court or counsel omitted from entry. In fact, as the record on its face shows, the machinery of the Orphans' Court of Philadelphia County was not invoked until April 29, 1940.

The Orphans' Court of Philadelphia County did not have, on March 18, 1941, jurisdiction over the subject matter of the executor's petition for a decree *nunc pro tunc* relating back to 1937, 1938 and 1939, nor has that court jurisdiction now over said subject matter, no court having power to make and antedate a decree which it had not previously rendered or authorized, according to decisions of this Court cited below under "Reasons for Granting Petition."

Your petitioner raised objection at the outset to the Orphans' Court lack of jurisdiction over the aforesaid subject matter and has persistently continued her protest

by exhausting every step known to her, following said steps through to the Pennsylvania Supreme Court by (1) appeal, (2) certiorari, and (3) Petition for Writ of Prohibition in order to correct in its incipiency the Orphans' Court's jurisdictional excesses and to prevent further unauthorized and unlawful exercise of power by said court (R. 2), entailing unwarranted expense and jeopardizing your petitioner's vested property rights.

Any right of appeal which may be available to your petitioner in the distant future to attack the unwarranted proceedings of the Orphans' Court after their completion and in their entirety would be entirely inadequate to afford relief, as is more fully set forth in Paragraphs 9 and 10 of Petition for Writ of Prohibition (R. 3-4).

The Orphans' Court lack of jurisdiction over the subject matter appears on the face of the record, as above related.

Ruling of the Supreme Court of Pennsylvania.

Sur petition of Ethyl M. Shibe, praying for Writ of Prohibition directed to the Orphans' Court of Philadelphia County and to Lewis H. Van Dusen, President Judge, to prohibit further proceedings, action and decree pursuant to Decree of March 18, 1941, issuing citation to Ethyl M. Shibe to Show Cause Why a Decree should not be entered *nunc pro tunc,* as of August 6, 1937, authorizing the executor of the Estate of John D. Shibe, Deceased, to collect all of the rentals for premises 1378-80 E. Rittenhouse Street and 3429 North 6th Street, Philadelphia, from August 6, 1937 to March 31, 1939, the Supreme Court of Pennsylvania made the following order (R. 5):

"December 3, 1941.

The order asked for is refused.

Per Curiam."

Question Presented.

The single question presented is as follows:

Was it not the duty of the Supreme Court of Pennsylvania, by mandate of the provisions of the Fourteenth Amendment of the United States Constitution, to issue the writ of prohibition prayed for, when the record on its face shows that the lower court and the judge to which the prohibition applied for relates decreed that a citation issue to show cause why a decree should not be entered *nunc pro tunc*, when that court, or any of its judges, had not before taken action or rendered a decree against the person and upon the subject matter to which the petition for decree *nunc pro tunc* refers, intervening rights having vested?

Specifications of Error.

The Supreme Court of Pennsylvania erred in refusing to issue the writ of prohibition prayed for and in refusing to grant the rule to show cause attached to the petition praying for said writ (R. 5).

Articles of the United States Constitution Involved.

The Fourteenth Amendment of the United States Constitution is involved.

Article 6 of the United States Constitution is involved.

Reasons for Granting the Writ.

1. The Supreme Court of the State of Pennsylvania decided a Federal question of substance in a way not in accord with applicable decisions of the United States Supreme Court.

Cuebas Y. Arredondo v. *id.*, 223 U. S. 376 (1912);
Maney v. *United States*, 278 U. S. 17 (1928);
Gagnon v. *United States*, 193 U. S. 451 (1904);

Mitchell v. *Overman,* 103 U. S. 62 (1880);
Gray v. *Brignardello,* 1 Wall. 627 (1863);

In *Cuebas Y. Arredondo* v. *id.* (above cited) (p. 390) this Court said:

> "A decree nunc pro tunc presupposes a decree allowed or ordered but not entered through inadvertence of the court * * *
>
> "There is no claim that a final decree in pursuance of the allegations of the bill had ever been directed and through inadvertence of either court or counsel omitted from entry. There was therefore no authority for a decree nunc pro tunc upon any known ground of equity procedure. Gray *v.* Brignardello, 1 Wall. 627."

In *Gagnon* v. *United States* (above cited) this Court held that entry of a decree *nunc pro tunc* when no degree had previously been made or ordered was a void act, subject to collateral attack, because the court had no jurisdiction to enter such order.

2. The public interest will be promoted. If vested rights of citizens can be destroyed or suspended at will by a lower court's action in doing at a later date what it could or should have done at a former date, but did not do at that former date, the foundation of our Constitutional system will be undermined.

The Pennsylvania Supreme Court, following decisions of this Court has held that a right of action is a vested right and that freedom from unwarranted litigation is likewise a vested right.

Lewis v. *Pennsylvania Railroad,* 220 Pa. 317 (1908);
Commonwealth v. *Brown,* 327 Pa. 136 (1937);
Wheeler v. *Jackson,* 137 U. S. 245 (1890);
Hendrickson v. *Apperson,* 245 U. S. 105 (1917);
Angle v. *Chicago, St. P., M. & O. Ry. Co.,* 151 U. S. 1.

By allowing litigation to proceed pursuant to a citation to show cause why a decree *nunc pro tunc* should not be entered, when none had previously been made or ordered, infringes substantive rights. The provisions of the Fourteenth Amendment to the United States Constitution become meaningless.

3. Under the decisions of this Court, the decree of the Orphans' Court of Philadelphia County dated March 18, 1941, to prevent and correct the results of which the writ of prohibition was asked, is wholly void and subject to collateral attack. No court has the power by judicial fiat to extend its jurisdiction over subject matter beyond the scope of the authority granted to it by its creators or prohibited by the Federal Constitution, as interpreted in decisions of this Court.

> *Gagnon* v. *United States*, 193 U. S. 451 (1904);
> *Valley* v. *Northern Fire Ins. Co.*, 254 U. S. 348 (1920);
> *Sorenson* v. *Sutherland*, 27 Fed. Sup. 44 (1939).

4. The Pennsylvania Supreme Court has (1) so far departed from the accepted and usual course of judicial proceedings and (2) has so far sanctioned such departure by the lower (Orphans' Court of Philadelphia County) court as to call for an exercise of this Court's power of supervision made mandatory in Article 6 of the United States Constitution, as follows:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

(1) Under the Pennsylvania Supreme Court's own decisions, the writ of prohibition is the proper and customary

remedy to prevent and correct the grievances set forth in your petitioner's petition filed in said court, praying for said writ.

In *McNair's Petition,* 324 Pa. 48 (1936), at page 64, the Pennsylvania Supreme Court said:

> "It is argued that this Court is without jurisdiction to award a writ of prohibition. In First Congressional District Election, 295 Pa. 1, at page 13, it was pointed out that this court possesses all the processes anciently possessed by the Court of King's Bench, unless limited by statute. Such a writ is proper not only whenever a court acts outside of its jurisdiction but also where there is an abuse of discretion. As stated in High, Extraordinary Legal Remedies (2nd ed.) 604: 'The object of the writ being to restrain subordinate judicial tribunals of every kind from exceeding their jurisdiction, its use in all proper cases should be upheld and encouraged, since it is of vital importance to the due administration of justice that every tribunal vested with judicial function should be confined strictly to the exercise of those powers with which it has been by law entrusted."

As stated in High on Extraordinary Legal Remedies (3rd ed.), page 724, Sec. 773a, and in decisions of this Court, it was the Pennsylvania Supreme Court's absolute duty to issue the writ of prohibition prayed for.

> "Where there is an entire absence of jurisdiction over the subject matter of the action, and this is apparent on the face of the proceedings, the granting of relief by prohibition is not a matter of discretion, but one of absolute right."

This Honorable Court said in *In re Rice,* 155 U. S. 396 (1894), at page 402:

> "Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of a cause originally or in some collateral matter arising

therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to the writ of prohibition as a matter of right."

(2) By refusing to issue the writ of prohibition sought by your petitioner, the Pennsylvania Supreme Court has sanctioned the lower court's departure from the accepted and usual course of judicial proceedings by allowing to stand and function, to the further infringement of your petitioner's rights, a decree in conflict with the Fourteenth Amendment to the United States Constitution and Article 6 thereof, and in conflict with the decisions of this Court, as set forth in paragraph 1 above, and in conflict with decisions of State and Federal courts throughout the Nation. No other appellate court anywhere in the United States, to petitioner's knowledge, has sanctioned a decree *nunc pro tunc* to the prejudice of intervening vested rights. A few of the hundreds of decisions rendered throughout the country are listed below:

Echevaria v. *Texas Co.*, 31 Fed. Sup. 596 (1940);
Application of Barilla, 29 Fed. Sup. 952 (1939);
Briggs v. *Briggs*, 299 Ill. App. 577; 20 N. E. (2d) 908 (1930);
Pendergrass v. *Duke*, 147 Ga. 10, 92 S. E. 649 (1917);
Payne v. *Riggs*, 80 W. Va. 57; 92 S. E. 133 (1917);
Woods Pharmacy v. *Kenton*, 50 Ariz. 53; 68 P. (2d) 705 (1937);
Bash v. *Howald*, 59 Okla. 116; 157 P. 1154 (1916);
Southern Pacific Ry. v. *Pender*, 14 Ariz. 273; 134 P. 289 (1913);
Jedele v. *Washtenaw*, 237 Mich. 520; 212 N. W. 89 (1927);
Walker v. *Robinson*, 147 Miss. 67; 112 So. 867 (1927);
Rae v. *Brunswick Tire Corp.*, 45 Ariz. 135; 40 P. (2d) 976 (1935);
Duncan v. *Carson*, 127 Va. 306; 105 S. E. 62 (1920).

Recapitulation.

By refusing to issue the writ of prohibition prayed for by your petitioner, and to which she had an absolute right, in order to prevent further unwarranted proceedings growing out of the Orphans' Court's exercise of powers over subject matter outside its jurisdiction, i. e.: in issuing citation pursuant to entry of a decree *nunc pro tunc* when no former decree had been rendered, authorized or applied for, and after intervening rights had vested, the Supreme Court of Pennsylvania rendered final decision on an important question of Constitutional law in a way not in accord with applicable decisions of this Court and in conflict with decisions of every appellate court in the United States.

To allow the decision to stand will open the way to the destruction of rights of citizens everywhere, guaranteed by the United States Constitution. It will make every citizen's legal status uncertain and unsafe. Unless this Court exercises its powers of supervision over State courts, guaranteed by Article 6 of the United States Constitution, rights and privileges legally acquired by citizens everywhere may be snatched away at any future time at the dictate of any lower court, without benefit of relief through appellate channels, thereby nullifying Article 6 of the Federal Constitution and rendering worthless the guarantee of due process of law provided in the Fourteenth Amendment thereto. Lower courts will be permitted to unmake the Constitution of the United States which the people of America made and adopted. Such usurpation of power should be prevented by those to whom the people have delegated the power of so doing.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court directed to the Supreme Court of Pennsylvania, demanding that the court send to this Court for

its review and determination on a day certain to be therein named, a full and complete transcript and all proceedings in the case entitled on its docket No. 457, Miscellaneous Docket No. 7, 1941, In re: Petition of Ethyl M. Shibe for Writ of Prohibition, to the end that said case may be reviewed and determined by this Honorable Court; that the errors which have occurred therein may be corrected, and that judgment of the said court be reversed and that the petitioner may have such other and further relief as may be appropriate.

Respectfully submitted,

ETHYL M. SHIBE.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and it is not filed for the purpose of delay.

ETHYL M. SHIBE.